

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: CenturyLink Sales
Practices and Securities
Litigation

)
) File No. 17-MD-2795
) (MJD/KMM)

) Minneapolis, Minnesota
) June 7, 2019
) 8:03 a.m.
)

Benjamin Craig, et al.,
Plaintiffs,

)
) File No. 18-CV-296
) (MJD/KMM)

vs.

) Minneapolis, Minnesota
) June 7, 2019
) 8:03 a.m.

CenturyLink, Inc., et al.,
Defendants.

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)

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

Proceedings reported by shorthand reporter; transcript
produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Let's call the first matter, please.

COURTROOM DEPUTY: In re: CenturyLink
Sales Practices and Securities Litigation, Civil Case
No. 17-MD-2795; and Benjamin Craig, et al. vs. CenturyLink,
et al., Civil Case No. 18-CV-296.

Counsel, please state your appearances for the record.

MR. GUDMUNDSON: Good morning, Your Honor. Brian Gudmundson for the plaintiffs.

THE COURT: Good morning.

MS. REGAN: Good morning, Your Honor. Anne Regan
on behalf of the plaintiffs.

THE COURT: Good morning.

MS. WANG: Good morning, Your Honor. Ling Wang on behalf of the plaintiffs.

THE COURT: Welcome.

MR. DUBANEVICH: Good morning, Your Honor. Keith Dubanevich for the plaintiffs in the securities case.

THE COURT: Good morning.

MR. BLATCHLEY: Good morning, Your Honor. Michael Blatchley from Bernstein, Litowitz, Berger & Grossmann for the lead plaintiff in the securities action.

THE COURT: Good morning.

1 MR. MATHAI: Good morning, Your Honor. Michael
2 Mathai from Bernstein, Litowitz, Berger & Grossmann for lead
3 plaintiff in the securities action.

4 THE COURT: Good morning.

5 MR. FISHBEIN: Good morning, Your Honor. Gregg
6 Fishbein, Lockridge, Grindal & Nauen, on behalf of
7 plaintiffs in the securities case.

8 THE COURT: Good to see you.

9 MR. FISHBEIN: Good to see you.

10 MR. MUELLER: Good morning, Your Honor. Keil
11 Mueller with Stoll Berne on behalf of the plaintiffs in the
12 securities action.

13 THE COURT: Good morning.

14 MR. McNAB: Good morning, Judge Davis. Bill
15 McNab, Winthrop & Weinstine, on behalf of the CenturyLink
16 defendant.

17 THE COURT: It's always good to see you.

18 MR. McNAB: Thank you, Your Honor.

19 MR. LOBEL: Good morning, Your Honor. Douglas
20 Lobel on behalf of CenturyLink.

21 THE COURT: Good morning.

22 MS. LIGHTDALE: Good morning, Your Honor. Sarah
23 Lightdale from Cooley on behalf of the defendants in the
24 securities case.

25 THE COURT: Good morning.

1 MR. GIBBS: Good morning, Your Honor. Patrick
2 Gibbs, also from Cooley, on behalf of the defendants in the
3 securities case.

4 THE COURT: Good morning.

5 MS. INGLIS: Good morning, Your Honor. Georgina
6 Inglis on behalf of the defendant in the securities case.

7 THE COURT: All right. I believe we have -- who
8 is on the line so we can make a record of that? Is anyone
9 on the telephone line? Please note your appearance.

10 MR. ROBINOVITCH: Hart Robinovitch from Zimmerman
11 Reed for plaintiffs in the consumer case.

12 THE COURT: Good morning.

13 MR. GUTKIN: Good morning, Your Honor. Jeff
14 Gutkin from the Cooley firm for defendant.

15 THE COURT: Good morning.

16 MR. VOGEL: Good morning, Your Honor. David Vogel
17 from Cooley's Reston office on behalf of CenturyLink.

18 THE COURT: Good morning.

19 All right. Those of you that are on the telephone
20 line, I would ask you to mute your phones so I don't have to
21 hear your dog or music playing in the background. Come on,
22 people can laugh. It's 8:00 in the morning.

23 (Laughter)

24 THE COURT: Let's proceed. Do I have an update of
25 what's going on?

1 MR. GUDMUNDSON: Yes, Your Honor. Good morning.

2 THE COURT: Good morning.

3 MR. GUDMUNDSON: Brian Gudmundson again on behalf
4 of plaintiffs. I'm here with an update for Your Honor on
5 the status in the consumer cases.

6 The parties on May 20th mediated the case in front
7 of Judge Layn Phillips. We entered into a term sheet four
8 days later and have settled the case tentatively.

9 The structure of the settlement is a closed
10 nonreversionary fund, which is going to be comprised of a
11 monetary fund of \$15.5 million. There will be \$3 million
12 for claims administration. There will be more provisions
13 related to claims administration, which I'm happy to
14 discuss. We will also be negotiating injunctive nationwide
15 relief.

16 One of the important things that the parties are
17 going to be doing, and we have a request for Your Honor
18 related to this, is conducting some confirmatory discovery,
19 which we believe will take some time. And to that end the
20 parties would like to request that the Court enter a stay of
21 our proceeding so that we can conclude negotiations in
22 preparation of a settlement agreement and present this
23 settlement, tentative settlement, to the Court for
24 preliminary approval as soon as possible.

25 Right now we anticipate that that process will

1 take until approximately mid August, early September,
2 although it may be sooner. We are working very hard to try
3 to get things done. If it takes a little longer, it's
4 because the efforts are -- not because the efforts are not
5 being pursued strong, but because there's just a lot of work
6 to do.

7 Really that's all I have for you, Your Honor.
8 We're pleased to provide updates in the interim if the Court
9 desires to know what's going on --

10 THE COURT: I do.

11 MR. GUDMUNDSON: -- as these weeks and months
12 proceed. So we would be happy to establish status
13 conferences or simply check in with Your Honor and schedule
14 according to your wishes.

15 THE COURT: I think it would be best that you just
16 every 30 or 45 days send me an update signed by both parties
17 so I know that everyone is agreeing to what's being said.

18 MR. GUDMUNDSON: Sure. Would a letter ECF'd and
19 submitted to your chambers be sufficient?

20 THE COURT: Yeah, I believe that -- I think that's
21 best, so everyone knows what's going on --

22 MR. GUDMUNDSON: Sure.

23 THE COURT: -- instead of having it just sent to
24 my chambers.

25 MR. GUDMUNDSON: Unless the Court has any

1 questions, I really have nothing further, Your Honor.

2 THE COURT: All right. Thank you.

3 MR. GUDMUNDSON: Thank you.

4 THE COURT: Any response? Good seeing you again.

5 MR. LOBEL: Good seeing you, Your Honor. Very
6 pleased to be here today. I agree with --

7 THE COURT: It's warm.

8 MR. LOBEL: It is warm. I've been here when it's
9 cold and I've been here when it's warm.

10 Your Honor, I agree with everything that
11 Mr. Gudmundson said. We are pleased that we were able to
12 reach a tentative settlement. We think this is a very
13 reasonable compromise for the class in light of the strong
14 arguments that we believe we had with respect to the motion
15 to compel arbitration with respect to class certification
16 issues. We think it's a fair and reasonable outcome for the
17 class, and we also think it has great benefits for judicial
18 economy given the likely duration of this matter no matter
19 what happened on the pending motions.

20 So we are committed to working hard to efficiently
21 complete the confirmatory discovery. We will document the
22 settlement and we will set up an orderly and efficient
23 claims process, and we give you our word that we're
24 committed to do that.

25 THE COURT: I know that you are. I respect both

1 sides and what you've done. It's amazing. I didn't expect
2 it. When I received notice that there was a settlement, I
3 was happy to see that.

4 MR. LOBEL: Thank you.

5 THE COURT: Not because of court efficiency, but I
6 think from a business perspective, I thought it was best.

7 MR. LOBEL: Thank you very much.

8 THE COURT: All right. Let's call the next
9 matter.

10 COURTROOM DEPUTY: I called them both.

11 THE COURT: Oh, you called them both. Let's
12 proceed.

13 MR. GIBBS: Good morning again, Your Honor.
14 Patrick Gibbs from Cooley on behalf of CenturyLink and the
15 individual defendants in the securities case.

16 THE COURT: Good morning.

17 MR. GIBBS: Your Honor, we have some slides that
18 we're prepared to display electronically, but I also have
19 hard copies if the Court would like me to hand up some
20 copies.

21 THE COURT: Please. Would you, please.

22 MR. GIBBS: Certainly. How many copies would the
23 Court like?

24 THE COURT: I need three: one for myself, one for
25 my court reporter, and one for my law clerk.

1 MR. GIBBS: May I approach, Your Honor?

2 THE COURT: You may.

3 MR. GIBBS: Thank you.

4 (Documents handed to the Court)

5 MR. DUBANEVICH: Your Honor, if I can interrupt?

6 Just from a housekeeping perspective --

7 THE COURT: Turn the microphone on.

8 MR. DUBANEVICH: Good morning, Your Honor. I
9 would like to interrupt just for housekeeping purposes.
10 It's 8:10 a.m. and we understood that you had a hard stop at
11 9:00. If that's not correct, I just kind of wanted to
12 figure out what our timing was this morning.

13 THE COURT: It's a hard stop at 9:00.
14 Unfortunately I have to be at -- well, we'll see how it
15 goes. It's a hard stop at 9:00. It's my 50-year college
16 reunion. I don't know why, but they want me to be there.
17 They want to honor me at every event possible, and we've
18 been getting e-mails and calls from the president of the
19 college and so that's what we are putting up with and so --
20 but this is more important to me than being there on time
21 and so we'll try for the 9:00 hard stop and if we need to go
22 past that, we'll just have to go past that.

23 MR. DUBANEVICH: Thank you, Your Honor.

24 MR. GIBBS: Thank you, Your Honor. I'm mindful
25 that we are fairly short of time. Before launching into a

1 long presentation, I wanted to first ask if there's any
2 particular part of our motion that the Court is particularly
3 interested in discussing with us or if you have any
4 questions that you would like me to address.

5 THE COURT: I need you to focus on the area that
6 you think is most important and usually that's the weakest
7 part of your argument.

8 MR. GIBBS: That's fine, Your Honor. Thank you.

9 THE COURT: You know that's where the opposing
10 side is going to go, so let's deal with those issues.

11 MR. GIBBS: That's fine, Your Honor. Thank you.
12 I would like to begin with a reminder of the plaintiffs'
13 theory of the case and what that implies for their pleading
14 burden.

15 As the Court knows, this whole series of cases
16 really begins with a set of consumer class actions that the
17 Court was just discussing with some of my colleagues and the
18 question is how do the plaintiffs try to turn a set of
19 consumer class actions into a securities class action.

20 It's obviously not securities fraud for the
21 company to have been sued in some consumer class actions.
22 Consumer class actions get filed routinely across the
23 country and it doesn't by itself amount to securities fraud.

24 And so what the plaintiffs in the securities case
25 have done to try to convert these consumer class actions

1 into the basis for a securities class action is to lay out
2 an incredibly aggressive theory of the case.

3 And the theory is not only was there some amount
4 of improper billing at CenturyLink, but, in fact, the
5 alleged improper billing was, in effect, the business
6 strategy. This is how they ran the company. This is where
7 the revenue came from.

8 So, in other words, the plaintiffs' theory of the
9 case is that for over four years CenturyLink systematically,
10 routinely across the entire company intentionally overbilled
11 millions of customers by hundreds of millions of dollars to
12 such an extent that it materially inflated the revenues of a
13 company whose quarterly revenues during that period
14 routinely exceeded \$4 billion every quarter, consumer
15 revenues hovering around a billion and a half dollars every
16 single quarter.

17 So the implication of that theory is that this
18 alleged overbilling scheme would have to be absolutely
19 massive, would have to be absolutely routine across the
20 entire company and, most importantly for securities fraud
21 purposes, the senior executives of the company, the people
22 speaking to the market would have to know that it was going
23 on, would have to know that it was going on to such an
24 extent that it was materially inflating the company's
25 revenues.

1 That's the burden they've taken on with the theory
2 of the case they have laid out, and we would respectfully
3 submit the complaint currently before the Court does not
4 come close to carrying the burden they bear.

5 Before getting into the particular allegations, I
6 want to start with just the question of whether this is even
7 a plausible theory as it's laid out in the complaint.
8 Obviously the Court needs to draw reasonable inferences in
9 the plaintiffs' favor, but a complaint also has to meet some
10 threshold level of plausibility, as we've learned from the
11 Supreme Court.

12 And in this case the theory is, as I said, for
13 four and a half years CenturyLink systematically and
14 routinely overbilled millions of people by hundreds of
15 millions of dollars. Those overbillings would have been
16 reflected in bills that were sent to customers. This is not
17 something that could be plausibly hidden from people for
18 very long because people get bills and they pay their bills.

19 According to plaintiffs, CenturyLink has been
20 caught in this scheme in a very public way. That's how they
21 claim the so-called truth has come out. And yet the world
22 we see reflected in the complaint looks nothing like the
23 world we would see if a company had been caught overbilling
24 millions of people by hundreds of millions of dollars over
25 four and a half years and been very publicly caught.

1 Let's start with the fact that according to
2 plaintiffs' theory of the case, CenturyLink's historical
3 revenues were materially inflated by fraud and that's been
4 publicly disclosed.

5 Not only, though, has there been no restatement of
6 those previously publicly-reported revenues, but, in fact,
7 CenturyLink's independent audit firm has continued to issue
8 clean audit opinions for financial statements that include
9 the very revenue numbers that the plaintiffs claim were
10 materially inflated.

11 And the company has been caught and yet nobody has
12 done anything about it. There are no other indicia in the
13 complaint of the kind of public fallout that one would
14 expect to see if an overbilling scheme of this magnitude had
15 come to light.

16 So just as a starting point, the scheme itself is
17 implausible to begin with. The complaint does not describe
18 a set of circumstances one would expect to see if that
19 scheme really had occurred and really had come to light,
20 which is necessary for there to be a securities fraud claim.
21 And so just as a starting point, we think the theory laid
22 out in the complaint is implausible.

23 So the question is whether they have alleged
24 sufficient facts to support a reasonable inference in their
25 favor that this scheme existed, that this scheme materially

1 inflated the company's revenues over this period, and
2 whether the complaint alleges particularized facts
3 sufficient to support a strong inference of scienter, which
4 is that the senior executives, the people speaking to the
5 market actually knew this scheme was going on and actually
6 knew it was happening on such a massive scale that it was
7 materially inflating the company's revenues.

8 Now, as we've said in the briefing, given that
9 there's been no public admission or public finding or
10 confirmation that this supposed scheme even existed, the
11 plaintiffs try to make out their case through 20 former
12 employees that they claim they interviewed and they purport
13 to report in their complaint what these people told them.

14 The facts attributed, the statements attributed to
15 these 20 former employees do not come close to establishing,
16 A, that there was such a massive, company-wide, systematic
17 overbilling scheme or, B, that any of the senior executives,
18 that any of the individual defendants or any of the speakers
19 knew that this scheme existed and was materially inflating
20 the company's revenues.

21 I've got slide 5 from our presentation up in front
22 of the Court. First of all, the 20 former employees are a
23 tiny fraction of the overall employee base of this very
24 large company.

25 Seventeen of them do not purport to have spoken to

1 a single one of the individual defendants. As we've cited
2 case law out of the Eighth Circuit and elsewhere, that alone
3 means those former employees, 17 of them, have nothing to
4 say about the defendants' state of mind. They add nothing
5 to the scienter question that I personally think is the
6 clearest weakness in the complaint.

7 Twelve of these former employees worked in very
8 low-level sales and customer service positions, usually only
9 in one location, for their tenure at the company. Those
10 people have nothing to say about any kind of company-wide or
11 systematic scheme. They could have observed at most things
12 happening in a single call center.

13 Eight of the former employees actually
14 affirmatively describe a set of policies and practices that
15 were in place for resolving customer complaints and billing
16 issues at CenturyLink.

17 This is important because I think it's crucial for
18 the Court to have in mind the kinds of billing issues that
19 the plaintiffs are routinely alluding to are a fact of life
20 in a customer-facing business of this scale.

21 This is a company, as I said, that's serving
22 millions of customers all around the United States. They're
23 doing business by telephone with individual consumers on a
24 massive scale. They have millions of customer interactions
25 every year. It is inevitable that there will be some

1 routine level of billing mistakes, billing complaints,
2 billing inquiries and the like.

3 The fact that the company has a structure that is
4 set up to address and resolve those types of billing issues
5 makes crystal clear that at least up to some level billing
6 complaints, billing disputes, issues like this are routine.
7 They are not indicative in and of themselves of a massive
8 company-wide scheme to inflate revenue by intentionally
9 overbilling customers.

10 Five of these former employees worked at
11 CenturyLink for less than a year during the alleged class
12 period.

13 Only two of these former employees purport to
14 describe some level of company-wide customer billing issues
15 or complaints. And this is one of the only areas where the
16 complaint purports to provide any type of quantitative
17 information about customer complaints. Those allegations,
18 though, routinely slip in both cramming, which is what the
19 plaintiffs claim happened here, and, quote, other billing
20 issues, which are not described or explained in any way.

21 But in any event, to the extent those former
22 employees are describing some level of customer complaints
23 across the company, the numbers they're giving amount to a
24 tiny fraction of the company's customers during the period
25 in question. There's nothing about that number of

1 complaints alone described by those former employees that
2 would suggest a massive company-wide scheme to intentionally
3 inflate revenues through billing fraud.

4 And then, finally, oddly for a case that is
5 premised primarily on an alleged overstatement of revenue
6 through billing fraud, we only have one former employee who
7 even worked in the finance department. This was a low-level
8 finance department employee who only -- who has nothing to
9 say about some company-wide scheme to cram or inflate
10 revenue through billing fraud.

11 So the sum of all this is we don't have a single
12 former employee who purports to estimate the financial
13 impact of cramming on CenturyLink's revenues. We don't have
14 a single former employee who is telling the Court that any
15 individual defendant or any other senior CenturyLink
16 executive encouraged, condoned, or directed people to charge
17 customers for things they hadn't ordered. None of them
18 purports to have gone to any of the defendants and informed
19 them that there was some massive, widespread, systematic
20 cramming of customers.

21 Without any allegations like that, you simply
22 cannot get to a finding of particularized allegations
23 supporting a strong inference of scienter at the least. We
24 also don't think you can get to any reasonable inference
25 that this scheme existed in the first place, but without

1 some link between whatever was happening on the ground in
2 the call centers and the senior executives, there simply
3 cannot be a finding of scienter here.

4 I want to focus quickly on the three former
5 employees who allegedly spoke to the defendants. One of
6 them, Former Employee 15, describes really nothing other
7 than a disagreement with senior management about the
8 marketing strategy. This former employee didn't like the
9 fact that the base price for products was set low and then
10 there were fees associated with those prices. This has
11 nothing to do with charging customers for products and
12 services they didn't order. It's a disagreement about how
13 the products should be priced and brought to market. It's
14 irrelevant to the plaintiffs' claim.

15 Former Employee 19 --

16 THE COURT: Well, 15, it's a little bit more than
17 that. It's not just a simple disagreement about the
18 business strategy. FE-15 alleges that Defendant Puckett,
19 Defendant Bailey, and Victory created a strategy to mislead
20 the customers.

21 MR. GIBBS: With all due respect, Your Honor, I'm
22 not sure I would agree that the strategy that Former
23 Employee 15 is describing is a strategy to mislead the
24 customer. What that former employee describes is we're
25 going to price the base product at a certain level, but

1 there will also be fees associated with it. Whether that
2 misleads the customer depends on how it's described to the
3 customer. This person has nothing to say about that.

4 This person's personal discomfort with that
5 approach to the business doesn't amount to the company
6 intentionally misleading its customers, much less on a
7 massive scale sufficient to inflate revenues.

8 THE COURT: We'll hear from the plaintiff, but I
9 think I can read correctly and I think FE-15 warned that the
10 strategy would mislead customers and Puckett, Bailey, and
11 Victory pushed forward with the strategy anyway, knowing
12 that it would likely lead to cramming.

13 MR. GIBBS: I understand, Your Honor --

14 THE COURT: That's being alleged and so let's be
15 careful how we characterize what these witnesses are saying.

16 MR. GIBBS: Fair enough, Your Honor, although I
17 don't think I would agree with the knowing that this would
18 mislead the customers. FE-15 thought it would mislead the
19 customers. I don't know how FE-15 can conclude that
20 Puckett, Bailey, and Victory agreed that it would mislead
21 the customers. That seems to be something that one could
22 have a different view on.

23 But in any event, it's also a different type of
24 conduct than what I understand the complaint to be
25 describing as cramming, which is charging customers for

1 products and services they didn't order. That seems to me
2 to be a different issue, are they correctly disclosing all
3 aspects of the pricing for a given product or a service.

4 Former Employee 19 purports to have had
5 discussions with Post and Puckett about how to resolve
6 customer complaints, but is one of the employees I mentioned
7 before who confirms that there were policies and procedures
8 in place to resolve them.

9 I don't think anything in the allegations about
10 Former Employee 19 supports the inference that there was a
11 widespread, company-wide, systematic scheme to inflate
12 revenues by charging customers for things they didn't order.

13 And then finally we have Former Employee 5, who
14 has alleged to have spoken to Defendant Bailey. Plaintiffs
15 have laid out a fairly detailed set of allegations about an
16 interaction between these two at the Breakers Hotel in Palm
17 Beach, followed by an e-mail that the complaint purports to
18 describe in some detail.

19 The problem is, having described that e-mail in
20 such detail in their complaint, it is now incorporated by
21 reference into their complaint. We've submitted it to the
22 Court as Exhibit 26 to my declaration.

23 The e-mail makes quite clear that their
24 interaction had nothing to do with cramming or overbilling
25 customers at all. It is flatly inconsistent with the

1 plaintiffs' allegation. And under basic federal court
2 pleading law, where there is a conflict between the
3 allegations in the complaint and a document properly
4 incorporated by reference, the document controls.

5 Now, some of the other specific allegations I want
6 to touch on briefly.

7 We don't think they come close to establishing
8 either the alleged scheme or scienter on the part of any of
9 the individual defendants or any of CenturyLink's other
10 senior executives.

11 There's a series of allegations about something
12 that's characterized as an internal CenturyLink audit. That
13 allegation is lifted entirely out of a discovery letter
14 briefing in a separate case brought by the Minnesota
15 Attorney General. We have laid out in the briefs the
16 reasons why that doesn't meet the pleading standard.

17 In their opposition plaintiffs have massively
18 mischaracterized their own allegation about this Minnesota
19 Attorney General assertion. Having said in their complaint
20 there was one internal CenturyLink audit showing that there
21 was potential overbilling of three and a half million
22 customers, in the opposition they say there are multiple
23 audits which show hundreds of dollars of overbilling per
24 customer, none of which is actually in the complaint. And I
25 would respectfully urge the Court to please focus on the

1 complaint, not the way the complaint is characterized in the
2 opposition brief.

3 In any event, the Court does not have before it
4 any information about what this purported internal audit is,
5 who created it, how they created it, whether it's in any way
6 reliable. But even taken at face value, the fact that
7 3.5 million customers were, quote, potentially overbilled
8 doesn't get you to there was a massive, company-wide,
9 systematic scheme to inflate revenues by overbilling
10 customers.

11 Plaintiffs have also focused on this story of how
12 the company allegedly tried to change its sales practices
13 and to adopt something plaintiffs call a behavioral coaching
14 model. They claim that having adopted this model, they saw
15 sales plummet and immediately reversed course and went back
16 to the old way of doing things, after which revenues bounced
17 back up. The problem is this set of allegations also is
18 flatly inconsistent with judicially-noticeable facts.

19 Now, I think, again, if the Court focuses not on
20 how the plaintiffs characterize that allegation, but on the
21 allegations themselves, it's a conglomeration of things
22 attributed to a handful of confidential witnesses or former
23 employees, none of whom actually tells the story that
24 plaintiffs lay out either in their complaint or in the
25 opposition. They sort of cobbled together statements from a

1 handful of people to put this story together.

2 But more importantly, in all objective respects,
3 the story is clearly untrue. They claim that in the fourth
4 quarter of 2014 the company saw some drastic reduction in
5 consumer revenues by virtue of having changed its sales
6 model and that the revenues rebounded later in 2015.

7 We have shown the Court, from the company's
8 publicly-reported revenue numbers, there was no drastic
9 decline in consumer revenues in the fourth quarter of 2014.
10 Those revenues actually went up slightly in that period from
11 the period before. Nor was there a dramatic increase later
12 in 2015 after the company allegedly abandoned this
13 behavioral coaching model.

14 So the story doesn't add up. It is inconsistent
15 with judicially-noticeable facts. It does not support the
16 plaintiffs' claim.

17 It is also inconsistent with the facts in the
18 sense that the story purports to say that Former Employee 5
19 had his conversation with Mr. Bailey in the spring of 2014
20 and immediately after that Mr. Bailey was promoted into a
21 role that led to the creation of this new behavioral
22 coaching model.

23 The problem is judicially-noticeable documents
24 confirm that Mr. Bailey was not appointed to that position
25 until sometime in 2015, not in 2014. And, as I said, the

1 revenue -- the changes in the reported consumer revenue
2 don't match up with the story they're telling.

3 Now, plaintiffs have strained, really strained to
4 try to argue that this case is just like the *Wells Fargo*
5 case, and we have briefed this issue extensively. I won't
6 dwell on it here except to note a couple of very important
7 factors.

8 In *Wells Fargo* it was effectively conceded, it had
9 been found in a consent decree by a federal regulator that
10 Wells Fargo employees had created over one and a half
11 million fake deposit accounts and over a half of million
12 fake credit card accounts for customers. The fact that that
13 conduct had occurred was not meaningfully in dispute in the
14 *Wells Fargo* cases.

15 The issue that Judge Tigar was grappling with,
16 over a series of motions to dismiss, was to what extent have
17 the plaintiffs alleged facts showing that Wells Fargo's
18 board knew about these things during the class period.
19 That's what the majority of those opinions is devoted to.

20 We do not have anything like that federal
21 regulator finding here. We don't have an admission or a
22 finding that there was overbilling or intentional
23 overbilling happening on some kind of massive scale. So
24 that's a key distinction.

25 Setting that distinction aside, in finding

1 scienter in the *Wells Fargo* cases, Judge Tigar walked
2 through what he called a battery of particularized factual
3 allegations that he believed supported an inference that the
4 board knew of and did nothing about illegal activity. We do
5 not have anything like that battery of particularized
6 factual allegations here.

7 And given the shortness of time, I won't sit here
8 and read the slides to the Court, but we've laid out here
9 all of the different factual allegations, the red flags that
10 Judge Tigar noted.

11 THE COURT: Didn't he note that the imposition of
12 strict sales quotas and close tracking by a company
13 established scienter?

14 MR. GIBBS: He did not note that that by itself
15 established scienter, not at all. In fact, Judge Tigar
16 noted repeatedly that his finding of scienter was not based
17 on any individual allegation like that, but was based on the
18 totality of the allegations, which is why we've tried to lay
19 out as many of them here as we could. I agree that one of
20 the things the judge looked at in that case was the
21 existence of sales quotas.

22 THE COURT: Let's spend some time on this.

23 MR. GIBBS: Sure.

24 THE COURT: Go ahead.

25 MR. GIBBS: Okay. Let me go back, then. So these

1 are some of the objective factors I alluded to before.

2 By the time Judge Tigar was considering the
3 motions to dismiss in the *Wells Fargo* cases, there had been
4 a public disclosure, not meaningfully disputed by the
5 company, that their employees had created over 2 million
6 fake accounts. This had, by definition, inflated this
7 cross-sell metric that Wells Fargo had repeatedly reported
8 along with its financial results, talking about the number
9 of different Wells Fargo accounts that they were selling
10 into each household. By the time Judge Tigar was
11 considering those motions, regulatory bodies had leveled
12 fines against Wells Fargo of over \$185 million.

13 And, again, as I said, Judge Tigar's decision was
14 based on this aggregation of red flags that he found alleged
15 in the complaints there. Now, as I said, the plaintiffs are
16 trying very hard in this case to try to echo some of those
17 red flags in *Wells Fargo*, but I believe Judge Tigar's
18 opinions are quite clear that the finding of scienter is not
19 based on any individual one of those red flags by itself,
20 but rather on the combination of all of them.

21 We don't have anything like the combination of red
22 flags here that Judge Tigar was considering in the *Wells*
23 *Fargo* cases. For one thing, one of the primary red flags
24 that Judge Tigar alludes to repeatedly in his opinions is
25 the fact that Wells Fargo's CEO at the time testified before

1 Congress and admitted that Wells Fargo's directors and
2 officers had known about the fraud for many years before it
3 came to light and before it ended. That was a key red flag
4 for him. There is nothing like that alleged in this case.

5 Judge Tigar alluded to a former Wells Fargo banker
6 who had sent multiple letters directly to the board
7 detailing the very specific allegation of unauthorized
8 customer accounts that were completely ignored by the board
9 and that this person persisted a number of times over a
10 period of time.

11 There were at least ten different legal actions
12 filed against the company during the class period repeating
13 this very specific allegation of unauthorized customer
14 accounts. The L.A. City Attorney was one of the lawsuits
15 that was filed. There was at least one whistleblower
16 complaint that led to the Department of Labor making a
17 finding of reasonable cause to believe that this type of
18 activity had occurred. Now, I expect plaintiffs will say
19 here we have lots of lawsuits too and so that's similar.

20 There's a really, really important distinction.
21 Judge Tigar -- and Judge Tigar specifically says this in his
22 opinion. He was not citing the lawsuits as evidence that
23 the conduct had occurred. What he was doing with the
24 lawsuits was saying the fact that these lawsuits are getting
25 filed over and over and over and over again and making the

1 very same specific factual allegation is part of what put
2 the board on notice that this was happening.

3 The lawsuits here, all of the consumer lawsuits
4 that were filed, they were filed after the so-called truth
5 came to light. Nobody can seriously claim that the consumer
6 class actions filed here, after the first of the alleged
7 corrective disclosures, somehow put CenturyLink's senior
8 executives or directors on notice of this supposed massive
9 scheme to inflate revenues. It's a key distinction.

10 The only reason Judge Tigar is looking at the
11 lawsuits in *Wells Fargo* is because they were happening
12 during the class period before the fake account scheme was
13 publicly disclosed, and he was saying the filing of those
14 lawsuits with this very specific allegation is one of the
15 things that put the board on notice that this was happening
16 at the company. That's not true here.

17 I would note too, by the way, there's a very
18 important distinction between *Wells Fargo* and the
19 allegations in this case. There's no circumstance in which
20 bankers opening up a credit card or deposit account for a
21 customer without the customer's knowledge is excusable,
22 right? It is inherently fraudulent. It is inherently
23 criminal. It is not the type of conduct that would be the
24 subject of a routine billing dispute where someone might not
25 have understood the charges they were going to see on their

1 bill. That's a very, very different type of conduct.

2 Judge Tigar also noted -- and, again, this is
3 during the class period. This is not part of the revelation
4 of the fraud. This is something happening during the class
5 period that Judge Tigar felt put the defendants on notice of
6 what was happening at Wells Fargo. It was a *Los Angeles*
7 *Times* article based on interviews with 28 former and seven
8 current employees and internal bank documents and records.
9 There is not anything analogous to that here during the
10 class period.

11 Now, plaintiffs might say their complaint refers
12 to reports from former employees and that sort of thing,
13 but, again, nobody is claiming that the amended complaint
14 here somehow put senior executives at CenturyLink on notice
15 that this was happening during the class period. It's a
16 fundamental difference and the attempt to analogize to that
17 fails.

18 Judge Tigar cited several significant regulatory
19 interventions, including OCC supervisory letters that the
20 board didn't respond to at all, took no action to respond
21 to.

22 There were over 5,300 employees terminated, again,
23 during the class period, 5,300 terminated during the class
24 period for this conduct and yet the conduct continued over
25 and over and over and over again.

1 There were also allegations describing not just
2 the fact that senior executives and directors at Wells Fargo
3 received reports about sales issues, but reports that
4 documented increases in reports. So there were at least
5 some allegations about the content of the reports, which is
6 a key distinction between *Wells Fargo* and this case.

7 Here we have some generic allegations saying that
8 some of the senior executives received reports about billing
9 complaints or billing disputes or sales issues. None of
10 them describes the content of the reports in a way that
11 would suggest that those reports put CenturyLink's
12 executives on notice of a massive company-wide scheme
13 happening on such a scale that it was materially inflating
14 the company's revenues.

15 Unlike opening fake customer accounts, which is by
16 no means routine or normal, it is inherently a red flag that
17 something is going on wrong in the business, the fact that
18 you have customer complaints about bills, that you have
19 disputes about bills, that is, at least at some level, a
20 normal part of a consumer-facing business like this.

21 And so the fact that Post and other executives got
22 reports that there were -- showing that there were customer
23 complaints is not a red flag. It does not put them on
24 notice of this kind of massive scheme to inflate revenues
25 through billing fraud.

1 THE COURT: Well, they just didn't get complaints
2 on the billing. That's insulting to me. The reason why
3 they got the complaints were because of what? You tell me.
4 Because people were being billed for things that they did
5 not receive.

6 MR. GIBBS: You're alluding to the former employee
7 allegations about the reports that went to senior
8 executives?

9 THE COURT: Yes.

10 MR. GIBBS: Yes.

11 THE COURT: You just said they got reports of
12 billing disputes. Please. An executive is not going to get
13 a report on billing errors. They're going to be important
14 errors and that there are going to be allegations of
15 misconduct.

16 MR. GIBBS: With all due respect, Your Honor, I
17 don't know what's in the reports that are being described in
18 the complaint because they're not described with very much
19 specificity.

20 I will note that the allegations that purport to
21 describe reports going to senior executives routinely say
22 the reports involve complaints about cramming and other
23 billing issues. I don't know what that means.

24 I think it's clear from their allegations that
25 reports and complaints about cramming do come up in the

1 business. That is true. I don't think that's in dispute.
2 Again, there's a huge gap --

3 THE COURT: Are you saying your executives
4 wouldn't know what cramming meant?

5 MR. GIBBS: No, not at all, Your Honor. I'm
6 saying when I look at the complaint and they describe
7 reports talking about complaints about cramming and other
8 billing issues, I have no way of knowing how much of the --
9 how many instances of cramming they're reporting and what
10 are the other billing issues. There's a wide range of
11 things that could be categorized as other billing issues. I
12 don't know what they're talking about. We don't know what
13 those reports said.

14 I don't think that -- a senior executive receiving
15 a report that says there are customers who claim they were
16 crammed, there are customers who claim they were charged for
17 something they didn't order by itself does not put someone
18 on notice that this is happening intentionally, that this is
19 happening in such a widespread and systematic way that it is
20 actually inflating the revenues of a company whose quarterly
21 revenues routinely exceed \$4 billion, whose consumer
22 revenues routinely exceed one and a half billion dollars
23 every three months.

24 So the question is not were the executives aware
25 that customers sometimes complained about cramming. That is

1 alleged in the complaint. The complaint does allege there
2 were reports sent up to senior management that indicated
3 there were reports of cramming.

4 There's a huge gap between that fact and saying
5 the senior executives of the company knew that cramming was
6 happening systematically across the entire company on such a
7 scale that it actually materially inflated the company's
8 \$4 billion a quarter in revenue. It's just too wide of a
9 gap.

10 There's no reasonable inference to be made, much
11 less a strong inference, which is required for scienter,
12 from the mere allegation that senior executives were aware
13 that allegations of cramming had been made. Plaintiffs' own
14 former employee witnesses say that not all complaints from
15 customers were confirmed. Some of them were confirmed.
16 Some of them were not confirmed.

17 So, again, the fact that senior executives were
18 made aware of allegations of cramming, it's not a red flag
19 and it certainly doesn't show that these people were aware
20 of this massive scheme to inflate revenues through fraud.
21 You're reacting to my red flag comment.

22 THE COURT: Well, if you're a senior executive,
23 you have people underneath you and if something gets to the
24 senior executive's desk, I think that indicates some kind of
25 flag, whether or not it's red, pink, or bright red, because

1 there's -- the senior executive has other people taking a
2 look at what's happening with the business and is not going
3 to be bothered with just a routine complaint from a
4 consumer.

5 MR. GIBBS: Well, I don't want to quibble over
6 what "flag" means, so let me move away from that language.

7 THE COURT: Isn't that true? Just tell me the
8 pyramid that's in a company, in your company. A senior
9 executive just is not going to receive a complaint from a
10 customer that's paying \$150 a month on a bill.

11 MR. GIBBS: Probably not, but I guess --

12 THE COURT: Probably not?

13 MR. GIBBS: Yeah, probably not. I don't know. It
14 depends on the escalation procedures. It depends on what we
15 mean by "senior executive." Did the CEO get individual
16 complaints? Maybe directly. I don't know. But we don't
17 know from the complaint either.

18 THE COURT: Well, you know what a senior executive
19 is because you're using the term.

20 MR. GIBBS: Fair enough. So let's talk about the
21 individual defendants. Do I think the individual defendants
22 might have been made aware of individual --

23 THE COURT: Well, no. Use my hypothetical.

24 MR. GIBBS: So I don't disagree with Your Honor's
25 notion that something has to have some level of importance

1 to get up to the most senior executives in the company. I
2 don't disagree with that.

3 THE COURT: Okay. And the higher it goes, the
4 more serious it is?

5 MR. GIBBS: Probably true.

6 THE COURT: And that would be a signal that it
7 might be a red flag?

8 MR. GIBBS: It might be.

9 THE COURT: Okay.

10 MR. GIBBS: It might be.

11 THE COURT: All right.

12 MR. GIBBS: It might not be. The senior --

13 THE COURT: More than likely it would be?

14 MR. GIBBS: I don't know that I would agree with
15 that, Your Honor.

16 THE COURT: Okay.

17 MR. GIBBS: It's entirely plausible to me that
18 senior executives might receive regular reports that tell
19 them here's what our level of customer complaints are this
20 month, we've received X number of customer complaints. They
21 might get those reports.

22 The fact that they get reports isn't necessarily
23 indicative of a problem. It certainly indicates that the
24 information they are receiving is information they think
25 they need to have to do their job. But not everything

1 that's reported to a senior executive --

2 THE COURT: But they would have to know what is in
3 the complaints. Just because you get a number, let's say
4 you get X number of complaints, the senior executive is not
5 going to sit there and say, oh, okay, that number is not
6 high enough for me to be concerned about it. They're going
7 to be what is the complaint, what is the problem, what is
8 the problem that's causing it to get to my desk.

9 Why are you doing this to me, like I -- I was
10 chief judge of this court and I can tell you that what
11 landed on my desk became a red flag and so -- I guess I was
12 a senior executive, right?

13 And even as a judge, something my staff gives me
14 and it lands on my desk, that's going to be a red flag that
15 an attorney has done something or a *pro se* litigant has done
16 something. That means I have to take a look at it. It's
17 not something, oh, it's a piece of paper and I say shred it.

18 MR. GIBBS: I'm not suggesting it's a piece of
19 paper and you shred it, Your Honor. What I'm pointing out
20 is the law requires particularized --

21 THE COURT: I understand the law, but don't say
22 that a senior executive is going to get a piece of paper and
23 it may not indicate a red flag, because it's serious when it
24 gets to a senior executive. And don't tell me that you
25 don't know what a senior executive is.

1 MR. GIBBS: I will say neither of those things,
2 Your Honor.

3 THE COURT: All right. Let's move on.

4 MR. GIBBS: My only point is --

5 THE COURT: Let's move on. I understand what your
6 point is.

7 MR. GIBBS: Thank you, Your Honor. I'm mindful of
8 time.

9 THE COURT: I threw you off, so let's move on to
10 the other issues that you want to talk about.

11 MR. GIBBS: We've cited some cases from the Eighth
12 Circuit. We think those cases stand for the proposition
13 that if you are going to claim revenues or some other metric
14 like that were misstated, you have to give at least some
15 indication of the scale or at least allege sufficient facts,
16 again, to support a reasonable inference that the thing was
17 happening on such a scale that it materially impacted
18 revenues. We don't think they've done that here.

19 I want to touch briefly on another category of
20 statements which have to do with the company's strategies,
21 their code of conduct, their expectations for behavior.
22 We've cited the Court to cases recognizing those kinds of
23 statements are not tantamount to a guaranty that nobody ever
24 violates the code of conduct. The fact that some number of
25 employees sometimes violated the code of conduct does not

1 translate the code of conduct itself into a materially false
2 statement.

3 I'll touch on a few other categories of
4 allegations the plaintiffs use to try to establish scienter.
5 Actually, I want to set that aside for now, Your Honor. I
6 want to focus on a slightly bigger picture approach.

7 For scienter the Court needs to be apprised of
8 specific allegations going to each individual defendant's
9 state of mind, and I don't see how the Court can read this
10 complaint and have confidence that any specific individual
11 defendant was put on notice of facts suggesting that
12 cramming was happening on such a large massive scale that it
13 was materially inflating the company's revenues or that it
14 was happening so routinely that it rendered the company's
15 aspirational statements and code of conduct to be materially
16 false or misleading.

17 And I would simply urge the Court to please
18 carefully review the allegations as to each of the
19 individual defendants rather than the more impressionistic
20 high-level arguments that the plaintiffs make about senior
21 executives.

22 Your Honor, I want to just note before I sit
23 down -- we've made the point similar to this -- there are a
24 couple of individual defendants, Puckett and Douglas, who
25 are only alleged to have made very specific and limited

1 statements that the plaintiffs seek to hold them liable for.
2 All of the statements made by all of the other defendants, I
3 would be remiss if I didn't point out that Puckett and
4 Douglas are slightly differently situated and the Court
5 needs to consider individuals on an individual basis.

6 But with that, unless the Court has questions, I
7 would like to reserve the rest of my time.

8 THE COURT: Thank you very much.
9 Counsel.

10 MR. DUBANEVICH: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. DUBANEVICH: To remind the Court, my name is
13 Keith Dubanevich and I am here on behalf of the plaintiffs
14 in the securities case.

15 We have a very limited number of handouts which I
16 will circulate, but let me step back for a second and say
17 that these cases, the customer cases and the security cases,
18 are really a simple set of cases. They're not complex at
19 all.

20 CenturyLink told its customers that they could get
21 TV for 49.95 and instead they billed them 149.95 and they
22 forced them to take Internet services. That's illegal, it's
23 cramming, and it's fraud. And they did that millions of
24 times, not once, not twice, not a hundred, not a thousand,
25 but millions of times.

1 Similarly, they told investors, just like the
2 State of Oregon, that they would never place or record an
3 order for a product that was not authorized by the customer,
4 so Oregon, just like every other investor in the country,
5 can think, okay, I've got a company that is going to comply
6 with the law, they are going to tell me what they're doing,
7 and I'm entitled to rely upon it.

8 But what do we know that they did? They placed
9 millions of unauthorized orders for products that nobody
10 wanted. And it gets worse. When people called and said I
11 don't want Internet, they were charged an early cancelation
12 fee. When people called and said you're billing me 149.99 a
13 month and you said it was going to be 49, they said, oh, we
14 never offer anything for \$49 a month. And, Your Honor, if
15 this was isolated, we wouldn't be here.

16 So what we have is a company that recognized that
17 cramming and selling services to customers that didn't want
18 those services, that resulted in substantial revenue to the
19 company. And that practice of cramming and misbilling
20 people was well-known and widespread throughout the company.
21 It was not isolated to Arizona. It was not isolated to
22 Minnesota. It was across the company.

23 Now, unfortunately for investors, we didn't know
24 that. We bought under the belief that this was a company
25 that was going to comply with the law, that was going to

1 comply with what they said in their SEC statements and what
2 they told investors, but that's not what happened.

3 In June of 2017 *Bloomberg News* reported that when
4 a whistleblower, a former employee, had complained to the
5 management that we were selling stuff to people that didn't
6 want it, she got fired. And the *Bloomberg News* reporters
7 are saying this is just like Wells Fargo and the next
8 trading day CenturyLink's stock went down. And then not
9 surprisingly, customers recognized, geez, if this
10 whistleblower is correct, maybe this is a systematic
11 problem.

12 THE COURT: I have read your papers. I understand
13 all that.

14 MR. DUBANEVICH: So let me turn to --

15 THE COURT: Let's get to what the defendant has
16 argued. Scierter is very important here and we spent some
17 on that and I want you to spend some time on that.

18 MR. DUBANEVICH: I would. And if I can, Your
19 Honor, let's set up the law for a second. We are here on a
20 motion to dismiss, not a motion for summary judgment. When
21 I saw their 34 exhibits, I swear it must have been a summary
22 judgment motion, but it's not. Your Honor knows --

23 THE COURT: I understand. That's just a practice
24 that we've evolved to for the last 25 years. Everything
25 turns into a summary judgment.

1 MR. DUBANEVICH: However, this Court has actually
2 said in the *Retek* case in 2005 and the Ninth Circuit Court
3 of Appeals has recognized that in these securities cases it
4 has become rampant and it is unfair and it should not be
5 tolerated. The court in the Ninth Circuit case of *Khoja*,
6 which was cert denied last month by the U.S. Supreme Court,
7 the court in the Ninth Circuit said this is unfair, it is
8 unacceptable, and it should not be tolerated.

9 So I just want to point out that we're not here on
10 a summary judgment motion. Their exhibits are incomplete.
11 They refer to SEC filings, but they're only excerpts. Their
12 code of conduct that they attach is dated January of 2018.
13 Well, that's clearly not applicable in 2013, '14, and '15.
14 So I don't think Your Honor should look at their exhibits at
15 all.

16 So let's go directly to the points they raised in
17 their reply, and the first is that there is no evidence that
18 this was a widespread problem and they wrap that around
19 their complaints about Former Executive -- Former Employee
20 Number 5 and they seek to introduce an e-mail between one
21 person and a senior vice president, Mr. Bailey. As Your
22 Honor is well aware, this is not the time for you to assess
23 anybody's credibility, Mr. Bailey's, Former Employee 5, or
24 anybody else's.

25 But if you take a look at the *Signet Jewelers*

1 case, a case that we cited to Your Honor in January in our
2 letter to the Court, the court there rejected the
3 defendant's arguments that, geez, a former employee's
4 statements that were reported in the complaint should not be
5 considered because they didn't know what they were doing,
6 they weren't probative. The court said that's not
7 appropriate at a motion to dismiss stage.

8 So what we have, however, are allegations that
9 talk specifically about each of the former employees. And
10 Former Employee 5, we specified his job title, a consumer
11 and business sales manager. We identified his job location,
12 Boise, Idaho. We identified the job responsibilities. He
13 was an inbound sales manager who sold Internet and cable
14 services. We identified the duration of his employment.
15 There is simply no basis to disregard our allegations about
16 FE-5 or any other former employee.

17 We provided Your Honor a chart that identifies
18 these former employees and that chart shows that these
19 people are located all over the company. They're not
20 located just in Arizona or just in Minnesota. They're
21 located in all of the regions where the company does
22 business and they're from the company's headquarters in
23 Louisiana.

24 So if you take a look at the standard that this
25 Court described in *St. Jude Medical Securities Litigation*,

1 it's clear that we have met that standard and Your Honor
2 should consider the former employees.

3 And going back to that e-mail that counsel
4 referred to and that they attached, we did not incorporate
5 it by reference at all in our complaint. Indeed, it's not
6 been properly authenticated. It was printed by a Mr. Steven
7 Young and we have no idea who he is.

8 But even if Your Honor considers that exhibit, the
9 e-mail confirms that an Eric Adams met with Senior Vice
10 President Bailey in 2014, senior vice president, and he met
11 with another person and they discussed customer service
12 issues. And that's the e-mail that they submit.

13 Now, frankly, that's very similar to paragraph 109
14 of our complaint in which we say that FE-5 alerted both his
15 manager, Northwest Region Vice President Brian Stading, and
16 Senior Vice President Bailey at this Circle of Excellence
17 event that the problems were constant and rampant, cramming
18 and misquoting problems. And in that discussion this former
19 employee said that in response Mr. Bailey, senior vice
20 president, acknowledged the cramming issues and told
21 Stading, another executive, and FE-5 we've got to do
22 something about it.

23 Now, these allegations in our complaint are very
24 similar to the allegations in the *Galestan vs. OneMain* case,
25 a case that we cited in January in our letter to Your Honor.

1 There the plaintiffs relied upon former employees and the
2 defendant claimed that the allegations didn't show any
3 specific conversation with the executive, just what the
4 defendant is arguing here.

5 The court in that case rejected it and the reason
6 is, just as in this case, the defendants participated in
7 numerous meetings and conferences and they received a
8 monthly e-mail that disclosed the problems in that case. In
9 addition, just as we allege here, the defendants there had
10 access to reports that detailed the company's problems, in
11 that case productivity. And the court in that case said
12 that's more than sufficient to show that the executives knew
13 what was going on.

14 In their reply CenturyLink takes great issue with
15 our citation to the Minnesota Attorney General's letter
16 brief in which they describe an audit, an internal audit at
17 CenturyLink that shows that CenturyLink overbilled three and
18 a half customers. That makes up more than half of their
19 broadband customers. That's a significant amount of
20 customers.

21 Now, our allegations are not based solely on the
22 Minnesota AG's allegations, not even close. We've
23 interviewed at least --

24 THE COURT: Three and a half million?

25 MR. DUBANEVICH: Three and a half million, Your

1 Honor.

2 THE COURT: You said three and a half.

3 MR. DUBANEVICH: Very short people apparently.

4 Three and a half million. Thank you.

5 We've interviewed at least 20 former employees.
6 We've obtained extensive materials through public records
7 requests. And our investigation is very similar to the
8 investigation in the *Pension Trust Fund vs. DeVry* case that
9 we cited to Your Honor, and that's a Northern District of
10 Illinois case in which the court said confidential or former
11 employee statements are sufficient to establish that the
12 defendants knew what was going on at the company.

13 So let's talk a little bit about what our former
14 employees said. Former Employee 3 said the sales quotas
15 were unreasonable and did not reflect what employees who
16 were dealing honestly with its customers could expect to
17 sell. We pled that the executives at the company
18 established those quotas.

19 Former Executive -- Former Employees 5, 7, 9, 11,
20 and 13 said that CenturyLink routinely represented to
21 customers that they would be charged one price for a
22 particular service, but it would, in fact, charge a
23 different price.

24 We've established that FE-5 said every time I went
25 to a training, the facilitators were straight up about

1 telling new hires just tell them the total price. Don't
2 tell them anything about options. Don't tell them anything
3 about fees.

4 Numerous of these former employees, 4, 7, 11, 13,
5 14, 15, said CenturyLink routinely added services to
6 customer's accounts without authorization. This isn't an
7 isolated problem, Your Honor.

8 One person, who spent over 14 years at
9 CenturyLink, said during every sales training they did, the
10 trainers would instruct representatives that they could
11 quote a single price for Internet service without disclosing
12 underlying fees. Employees knew that was wrong.

13 But according to FE-11, cramming was rampant. It
14 was happening all the time and every day. 13 says it was
15 widespread throughout the company.

16 For example, if you look at 18, that person worked
17 as one of three managers of the Regulatory Services
18 Division. It was responsible for handling complaints from
19 the SEC, from State Attorneys General, the Better Business
20 Bureau, and executive complaints. Executive complaints are
21 complaints that go straight to the C-suite office that then
22 go down to Former Employee 18's group and they investigate
23 that. And of the cramming complaints that that group
24 reviewed, about half did, in fact, happen exactly the way
25 the customer said it.

1 FE-19 also confirmed that Defendant Post,
2 Defendant Puckett, and Defendant Victory were sent and
3 reviewed monthly reports concerning cramming reports that
4 CenturyLink received, and those reports had a specific
5 category for cramming complaints and FE-19 said this was
6 very common and widespread.

7 But that's not all, Your Honor. We researched
8 what the Arizona Attorney General alleged and we obtained
9 all of the publicly-available information about that case.
10 And the Arizona Attorney General alleged -- guess what?
11 -- CenturyLink billed customers at rates higher than those
12 it represented during sales calls, they billed customers
13 early termination fees when the customer canceled the
14 service after getting a bill that reflected a price they
15 didn't want to pay, that CenturyLink billed customers for
16 periods of service before the services were connected.
17 That's what the Arizona Attorney General said.

18 But wait. There's more. We allege that the
19 Minnesota Attorney General found that CenturyLink charged
20 over 12,000 Minnesotans more than was promised. And in
21 another case, another state found that 175,000 customers in
22 that state alone were overbilled.

23 But we did not rely upon just what we read in the
24 Minnesota AG's case. We conferred with the Minnesota --

25 THE COURT: Before we move on, it has nothing to

1 do with this, but I didn't understand why the Arizona
2 Attorney General only -- they settled for \$170,000, right?

3 MR. DUBANEVICH: 175 -- in another case. We're
4 not sure it happened in Arizona, but we know Arizona brought
5 their case. We have Minnesota that brought their case. And
6 a separate state apparently investigated and found 175,000
7 problems.

8 THE COURT: You submitted so much paper. But
9 there was one settlement for 170 --

10 MR. DUBANEVICH: Yes. That was Arizona.

11 THE COURT: That was Arizona. Just my own
12 interest, any reason why such a low amount?

13 MR. DUBANEVICH: No, Your Honor. I can tell you
14 from my experience as a former deputy in the Oregon
15 Department of Justice, but that would be outside the record.
16 But suffice it to say that CenturyLink did enter into an
17 assurance of voluntary compliance, which included injunctive
18 relief that the company and its officers were obligated to
19 comply with.

20 THE COURT: Okay. Go ahead. I'm sorry to bother
21 you with that.

22 MR. DUBANEVICH: We didn't -- no problem, Your
23 Honor, and I appreciate questions. It makes it a lot more
24 enjoyable for me as well.

25 We didn't rely just upon what we read in the

1 Minnesota AG's filing. We actually conferred with the
2 Minnesota AG's office to confirm that they indeed conducted
3 their own investigation and had a good-faith basis to make
4 the allegations they did.

5 Now, CenturyLink has complained, geez, we didn't
6 cite to or say anything about the audit other than what was
7 reported by the Minnesota AG. And that's correct. We would
8 love to see the audit, Your Honor, but CenturyLink is taking
9 great lengths to not disclose it to anybody. But when we
10 get into discovery, we're confident that that audit will
11 indeed confirm exactly what the Minnesota Attorney General's
12 Office described as showing.

13 Now, CenturyLink has complained that, gee whiz, we
14 shouldn't be allowed to rely upon or cite to allegations in
15 other lawsuits. Let me do a little bit of a pause to
16 address some of the cases that they mentioned.

17 One is *Maine vs. Countrywide*. In that case the
18 court found that the allegations were parroted almost word
19 for word from another lawsuit. We have not done that. And
20 the court found that plaintiff's counsel did not speak to
21 any of the sources on which the allegations were made, did
22 not examine any of the underlying documents, did not contact
23 the attorneys in the other cases whose allegations were
24 parroted.

25 That is not at all the situation here. We clearly

1 have conferred with the Minnesota AG's office. We have
2 collected voluminous documents. We have interviewed at
3 least 20 former employees. We have conducted exhaustive
4 investigation.

5 So let me turn to the defendants' argument that
6 this behavioral coaching idea just simply doesn't make any
7 sense.

8 So let's set this up. CenturyLink is getting
9 thousands upon thousands of complaints every month. They've
10 got an internal audit that shows they've got a cramming
11 problem. The executives are getting monthly reports, if not
12 more frequent, that shows that they have cramming problems.

13 How do they know that? Because they are having
14 such a high turnover and at exit interviews the employees
15 are saying these quotas are impossible for us to meet and
16 they're admitting that the only way they can meet those
17 quotas is by cramming.

18 So the company recognizes it has a problem, that
19 it is inconsistent with its code of conduct to be doing
20 that. So instead they change to what's called behavioral
21 coaching. FE-17, a director of human resources who reported
22 to Executive Vice President Kathy Flynn, said what we did is
23 we changed to a behavioral coaching model in which employees
24 were judged on the quality of their services, not on sales
25 metrics. We also pled that Defendant Post, one of the

1 senior executives in the company, recognized Flynn for her
2 work on the project.

3 We quoted and referred to FE-20, who said that,
4 yes, indeed they switched to a behavioral coaching model.
5 And she said we were having so much discipline and so many
6 investigations and we were hearing in the exit interviews
7 that it was because of the sales quotas, so CenturyLink had
8 to stop enforcing it.

9 So what happened? So they converted to a model
10 that's behavioral, which is to advise customers of the true
11 price of the product they want and sell them only the
12 product that the customer wants.

13 And what happens? Revenues went down. Well, how
14 do we know that? Well, according to FE-1, she said as soon
15 as the behavioral model was adopted, sales fell off very
16 quickly. FE-8 says I remember results dropping drastically
17 when people were no longer being managed to a number.

18 Not surprisingly, when sales dropped in June of
19 2015, Defendant Puckett left the company to spend more time
20 with her family. Now, CenturyLink --

21 THE COURT: But the amount -- the percentage
22 amount didn't drop that much.

23 MR. DUBANEVICH: Your Honor, the problem is that
24 CenturyLink changed the way they reported their data during
25 the class period and the filings that they have submitted,

1 Your Honor, are incomplete. They are merely excerpts. So
2 that evidence is not in front of you.

3 We believe that when an investigation takes place,
4 we will show that it was sufficient enough that the company
5 changed course and decided to abandon the behavioral
6 coaching model and go back to the cramming methodology that
7 they had used for many years. Defendant Puckett was fired,
8 we believe, because of that.

9 And so CenturyLink might not like these
10 allegations, they might even disagree with them, but at this
11 stage of the case, Your Honor, these are the allegations the
12 Court must presume are true.

13 So let's turn to the *Wells Fargo* case. We've
14 provided --

15 THE COURT: The reason I brought that up is
16 because you're alleging that an article in the *Wall Street*
17 *Journal* -- what was it, a 4.5 percent drop? This was a very
18 low percent drop.

19 MR. DUBANEVICH: It was enough that it got the
20 company's attention so that they had to change course. But
21 what they didn't do is tell the investors why there was a
22 drop. They didn't tell the investors that it was because
23 they abandoned cramming because they had problems and they
24 converted to a behavioral coaching model. And they didn't
25 tell investors that, geez, that behavioral coaching model

1 resulted in decreased revenue, so we're going to go back to
2 cramming. They didn't tell investors that. If they had, we
3 might not be here. But they didn't tell investors that.

4 So let me turn to the *Wells Fargo* case for a
5 second. In *Wells Fargo* -- as Your Honor can see from our
6 handouts, on the left what we did is we took defendants'
7 description of the *Wells Fargo* case and on the right we
8 simply showed Your Honor what our allegations are and, not
9 surprisingly, they are very similar to *Wells Fargo* with one
10 big difference. The conduct here was more widespread, it
11 was more significant, and it took place over a longer period
12 of time.

13 We clearly talk about the company executives in
14 both companies imposing very strict sales quotas. We talk
15 about a theory of bundling products and selling products to
16 customers that don't want those products. That's pretty
17 similar to what they did in *Wells Fargo*.

18 So let me move off *Wells Fargo* and get to
19 scienter. We don't have to prove at this stage anything.
20 All we have to do is make a reasonable inference, a strong
21 inference, but that does not license the Court to resolve
22 disputed facts at this stage. We just need to plead enough
23 information that there is a reasonable inference.

24 One of the cases we cited uses a baseball analogy,
25 which is a tie goes to the runner. If we have pled facts

1 which give a reasonable inference, they might have a similar
2 story, but if both of those stories are reasonable, the tie
3 goes to the runner and you must deny their motion. So let
4 me suggest that Your Honor look at both the DeVry and the
5 *Signet Jewelers* case. Those are the cases that talk about
6 the tie goes to the runner.

7 The inference of scienter need not be irrefutable,
8 Your Honor, or even the most plausible of competing
9 inferences. As long as it is as least as compelling as any
10 opposing inference, the complaint adequately alleges
11 scienter.

12 So what have we pled? We pled that the executives
13 established the sales quotas. We pled that company systems
14 kept track of whether people met their sales quotas and
15 whether cramming was occurring. We have pled that those
16 reports went to the senior executives.

17 We have pled that at least on a number of
18 occasions there were actual conversations with executives
19 about cramming. Indeed, we pled that Defendant Post
20 complained about the number of complaints he was saying --
21 seeing about cramming. That's specific and that is clear
22 knowledge that they had a problem.

23 We have clearly established that Defendant Bailey
24 had a conversation about cramming, and he acknowledged the
25 existence of that.

1 We've established through FE-8 that there are
2 these reports, a dashboard system that provided
3 up-to-the-minute data on sales and revenue.

4 We've established through FE-15 that that person
5 discussed the pricing problems with Puckett, Bailey, and
6 Victory.

7 We've said that FE-16 said that there were
8 problems that were recorded in something -- a system called
9 Q-Finity. Any team leader, director, or vice president had
10 access to that system and they would compile a report every
11 month and send that report to team leaders, directors, VPs,
12 and regional VPs.

13 FE-18 said CenturyLink's senior leadership, Post,
14 Puckett, Victory, and Olsen, got reports on the number and
15 types and categories of complaints from the FCC, from state
16 agencies, the Better Business Bureau, and direct customer
17 escalations. These are reports that went directly to the
18 top of the company.

19 So what did they actually tell investors? Did
20 they tell investors that they were generating revenue from
21 all the cramming and misrepresentations? No, not at all,
22 Your Honor.

23 What they said is they will never place or record
24 an order for our products and services for a customer
25 without that customer's authorization. They said our focus,

1 on the first day of the class period, is meeting the needs
2 of our customers. They repeated that over and over in every
3 report throughout the class period.

4 They not only said it's important what's to the
5 benefit of the customer, but they said it is not important
6 what we think is best. That's what Defendant Post told
7 analysts. Well, that's completely inconsistent with their
8 behavior of cramming and selling stuff to people that don't
9 want it, and that occurred consistently throughout the class
10 period.

11 So let me turn to their code of conduct.
12 Defendants have taken issue with, gee whiz, you can't hold
13 somebody responsible to a code of conduct and they cite, for
14 example, a couple of cases that were very aspirational.
15 Geez, we try to do the best thing. We try to comply with
16 the law. There was a recent Second Circuit case where
17 the --

18 THE COURT: Let's not spend time on this.

19 MR. DUBANEVICH: Excuse me?

20 THE COURT: Don't spend time on --

21 MR. DUBANEVICH: I will not.

22 THE COURT: It's not aspirational.

23 MR. DUBANEVICH: Okay. So let me then finish with
24 whether there was any impact on the stock because of their
25 misrepresentations. Let me circle back on this issue and

1 let's set the tone for the law.

2 As this court said in March of 2005 in the *Retek*
3 order, in the Eighth Circuit the causation requirement for
4 damages is not very stringent. Plaintiffs only need to show
5 some causal nexus between defendant's improper conduct and
6 plaintiff's losses.

7 This court said in *In re Buca* that plaintiff need
8 not prove loss causation with particularity. Rather, a
9 short and plain statement in accordance with FRCP 8(a)(2) is
10 sufficient. Your Honor, that's consistent with the *St. Jude*
11 case and with *Dura*.

12 And what we have clearly established and Your
13 Honor can see in our chart is that when the facts started
14 coming out, first with the news report of the whistleblower
15 being sued -- I'm sorry, being fired and then when consumers
16 started filing cases and made their allegations more public
17 and then when the Minnesota Attorney General filed her
18 complaint at that time, that's when the market realized what
19 was going on at CenturyLink and on each of those occasions
20 the stock fell precipitously. That is all we need to
21 allege. When we get into discovery, we will be able to show
22 it without any doubt.

23 But, Your Honor, I believe that our complaint
24 adequately pleads a cause of action under the applicable law
25 and the defendants' motion should be denied.

1 Do you have any questions?

2 THE COURT: Thank you very much.

3 MR. DUBANEVICH: Thank you, Your Honor.

4 THE COURT: Counsel.

5 MR. GIBBS: Thank you, Your Honor. I would like
6 to circle back to scienter, if I may. I'm glad counsel
7 agrees with me that it is not just a reasonable inference,
8 but a strong inference that's required and for that purpose.

9 THE COURT: And I agree with you too.

10 MR. GIBBS: Thank you, Your Honor.

11 (Laughter)

12 MR. GIBBS: I'm not surprised by that. I'm highly
13 confident in that position.

14 Your Honor, I'm not here to defend or minimize
15 cramming and I'm not trying to suggest that a report of
16 cramming going to a senior executive is not a serious thing.
17 If I left that impression, I want to apologize because
18 that's not our position.

19 THE COURT: Thank you. That's the impression I
20 got.

21 MR. GIBBS: All I'm trying to point out is to
22 support a strong inference of scienter, given the theory of
23 the case here, the information going to Mr. Post and the
24 other senior executives would need to be described in enough
25 detail that the Court can reach a strong inference that this

1 information put them on notice not just that cramming was
2 occurring, again, not to minimize that, but to distinguish
3 between some amount of cramming happening and cramming
4 happening so systematically on such a massive scale that it
5 results in a material overstatement of the company's
6 revenue. To support that inference you would have to have
7 far more detail than you have in the complaint before you.

8 I think that the Court can reasonably infer from
9 the facts alleged in this complaint that information and
10 reports went to Mr. Post and other senior executives
11 indicating that there were reports of cramming happening.

12 And, again, not to minimize that, but there is a
13 wide gulf between senior executives knowing that there are
14 instances of some employees violating company policy on the
15 one hand versus it's happening on such a massive scale that
16 it's actually inflating their \$4 billion a quarter in
17 quarterly revenue. I think it's just a bridge too far given
18 the very high pleading burden imposed by the PSLRA. Unless
19 the Court has any further questions on that, I'll move on.

20 I want to touch briefly on *Wells Fargo*. I
21 actually think plaintiffs' handout on that is actually quite
22 telling. What they've highlighted and analogized to this
23 case are three sentences where we simply describe the
24 plaintiffs' theory of the case in *Wells Fargo*.

25 And I have no doubt that the plaintiffs' theory of

1 the case here is intentionally modeled on the theory of the
2 case in *Wells Fargo*. That doesn't mean that the allegations
3 here across the board are so similar that Judge Tigar's
4 decisions in *Wells Fargo* should control or even be
5 persuasive here.

6 What they haven't highlighted, what they haven't
7 tried to meaningfully analogize to the facts alleged in
8 their complaint are the ones I was talking about covering
9 two slides, about all the things that Judge Tigar
10 characterized as red flags. They don't even discuss it
11 here. They don't highlight the sentences where we call out
12 some of those red flags in the brief. They have nothing to
13 say about all of the particular -- the battery of
14 particularized factual allegations that I discussed with
15 Your Honor at some length, and that's the difference. You
16 don't get to *Wells Fargo* controls this case just by saying
17 we've articulated a theory that's very much like their
18 theory in that case.

19 THE COURT: Well, plaintiffs are going to have to
20 come back up and deal with Tigar's holding and the analysis
21 of his opinion. And then I'll give you a chance to respond.

22 MR. GIBBS: Thank you, Your Honor.

23 I want to touch briefly on the Minnesota AG
24 discussion and the assertions in that discovery letter. I
25 have to say counsel's presentation to you just now is the

1 very first time I've ever heard any mention of plaintiffs'
2 counsel talking to the Minnesota AG's Office about the
3 assertions in that letter. It's not in the complaint. It's
4 not in the briefing. It is not a basis for the Court to
5 accept that allegation if it's otherwise not inclined to.

6 The story about behavioral coaching and the
7 alleged decline in revenue, counsel focused on statements
8 attributed to a couple of former employees about sales
9 dropping dramatically. Now, we've pointed the Court to the
10 publicly-reported revenue numbers, which presumably is what
11 the defendants would have been responding to, right? The
12 concern is they want to be able to report favorable
13 financial results.

14 We've pointed Your Honor to the specific financial
15 reports that were actually reported in that time period.
16 Their response is to quote a couple of former employees who
17 worked in human resources who say sales dropped
18 dramatically.

19 I don't know how one could possibly ignore the
20 publicly-reported revenue numbers and conclude, based on the
21 word of a couple of people in HR, that sales dropped
22 dramatically and that was the impetus for changing this
23 policy. I don't think that supports a reasonable inference,
24 much less a strong inference, of scienter.

25 Your Honor, may I consult briefly with my team and

1 see if we have anything else we want to say?

2 THE COURT: You may.

3 MR. GIBBS: Thank you, Your Honor.

4 (Mr. Gibbs and Ms. Lightdale confer)

5 MR. GIBBS: Your Honor, with that, I'll yield and
6 be ready to respond to whatever counsel has to say about
7 *Wells Fargo*.

8 THE COURT: Did you want to talk about the
9 termination of the whistleblowers at all?

10 MR. GIBBS: I would be happy to, Your Honor.

11 THE COURT: Please.

12 MR. GIBBS: So I'm not sure which allegation the
13 Court is focused on. I'm happy to talk about any of them.
14 I think --

15 THE COURT: FE-11 and FE-7 and FE-9.

16 MR. GIBBS: Let me get to those allegations. I
17 guess what I would say about them is I'm personally a little
18 skeptical of them, but I understand the procedural posture
19 requires the Court to accept factual allegations as true and
20 so I'm not going to quibble with them at that level.

21 I guess what I would say, though, is whatever is
22 going on with those individual employees, again, we're
23 talking about fairly low-level sales folks in individual
24 call centers. I don't think that has anything to do with
25 what the senior-most executives in the company knew about.

1 THE COURT: What about the executive resignations?

2 MR. GIBBS: I think the executive resignations,
3 we've pointed out in the briefing, based on some of the
4 public disclosures around those resignations, that the
5 plaintiffs' allegations are in certain respects just not
6 correct.

7 But I think more importantly than that, the
8 suggestion that Puckett was fired because of this thing
9 around behavioral coaching and what happened to revenues,
10 it's sheer speculation. It's just made up. There's no one
11 in the complaint who says I know why Puckett was fired and
12 it has something to do with revenue or behavioral coaching
13 or changes in the sales model. It is sheer speculation.

14 I mean, they have a four-and-a-half-year class
15 period. Some executives left during that four and a half
16 years. There's nothing suspicious or nefarious about that.
17 Given the sheer length of their class period and all of the
18 events they describe in their class period, it's inevitable
19 that those departures could be related in time to various
20 events in their complaint. I mean, the complaint is
21 describing conduct happening over a four-and-a-half-year
22 period.

23 There's no specific factual allegations to support
24 even a reasonable inference that any of those departures are
25 in any way related to the allegations the plaintiffs are

1 making here. It's not enough for them to say some
2 executives left and to speculate that that departure has
3 something to do with these sales issues or anything else.
4 The record is simply bare on that. It's nothing but
5 speculation.

6 THE COURT: Do you want to check with your
7 colleagues?

8 MR. GIBBS: I think I should, Your Honor. Thank
9 you.

10 (Mr. Gibbs and Ms. Lightdale confer)

11 MR. GIBBS: Your Honor, I won't belabor the point,
12 but I want to refer Your Honor to slide 23 in our
13 presentation, which is the one that touches on the executive
14 resignations and lays out the reasons why we think their
15 allegations are not consistent with the publicly-disclosed
16 and judicially-noticeable facts about those resignations,
17 but I don't think we need to belabor it here.

18 THE COURT: Thank you.

19 Counsel, before you get started, why don't we take
20 a stretch break so my court reporter can have a few minutes.

21 (Pause)

22 THE COURT: All right. You may be seated.

23 MR. DUBANEVICH: Thank you, Your Honor.

24 THE COURT: There's no rush anymore. I've missed
25 my meetings.

1 MR. DUBANEVICH: I apologize.

2 THE COURT: I mean I missed the ceremony.

3 MR. DUBANEVICH: I'm getting close to my 50th as
4 well and I'm not sure I want to go either.

5 THE COURT: I will be there this afternoon, but
6 this morning I won't be.

7 MR. DUBANEVICH: I want to directly address Your
8 Honor's questions about the *Wells Fargo* case. And not
9 surprisingly, we think it is remarkably similar. In that
10 case Judge Tigar went out of his way to describe the
11 high-pressure sales tactics and quotas that the senior
12 management put in place for the company. If you look at the
13 defendants' slides, slide 13, we talked about cross-selling
14 and here they were bundling.

15 What we know is that in the *Wells Fargo* case there
16 were one and a half million fake deposit accounts over --
17 and over 500,000 fake credit card accounts. In our case we
18 have between a third and a half of their customers being
19 falsely billed or crammed. Similar, if not greater, volume
20 of problems here.

21 They say that, gee whiz, you know, they haven't
22 been held responsible yet. Well, that's why we're here,
23 Your Honor. And they have apparently agreed to injunctive
24 relief with the customer plaintiffs.

25 In terms of whether the companies knew, well, the

1 Wells Fargo executive admitted under oath that they had
2 known about it for many years. Well, that was testimony
3 that came long after the case was filed. It wasn't
4 testimony or a public statement during the class period.

5 And here we have both Mr. Bailey admitting that he
6 was aware of cramming and we have evidence that monthly
7 reports went directly to Mr. Post and to other senior
8 executives notifying them of the changes in revenue, which
9 of course they track closely, and when they would have
10 complaints about cramming.

11 It would be foolish to say that a senior executive
12 at a public company does not take complaints to the FCC
13 seriously. And when they get to his level, you must take
14 them very seriously, and he was getting those reports at
15 least on a monthly basis.

16 We know that Ms. Heiser told Mr. Post in 2016, by
17 posting a message on some sort of internal company blog or
18 e-mail, that there was cramming going on and this wasn't
19 okay. So it's clear that the executives at CenturyLink knew
20 about the cramming and they condoned it because it led to
21 greater revenues.

22 Judge Tigar's description in his opinion indicates
23 that the defendants knew or deliberately disregarded their
24 cross-selling metrics when they reported to the public. And
25 that's exactly what we have here. The company disregarded

1 and ignored the data that they had about cramming and
2 misrepresentations to sell more services to their customers,
3 and they ignored that when they reported to the investing
4 public. So Judge Tigar found indeed that there were
5 material misrepresentations and that the executives had
6 scienter.

7 And in our view, given that the consumer segment
8 made up over 30 percent of CenturyLink's revenues, it is
9 certainly fair for Your Honor to presume that a company
10 executive is going to be very particularly interested in
11 what is happening with a core business function.

12 And in this case 30 percent or more of their
13 revenue is coming from the consumer division. Clearly an
14 executive should be paying attention to where that money is
15 coming from and how they're earning it.

16 Unless Your Honor has any further questions, I
17 would be happy to sit down.

18 THE COURT: Well, hold on for a second.

19 (Pause)

20 THE COURT: My understanding of the argument this
21 morning in dealing with *Wells Fargo* by the defendant is that
22 there were a number of elements within Tigar's opinion that
23 would not apply to the plaintiffs' case and I would like you
24 to address that issue.

25 MR. DUBANEVICH: Sure. Going back to their

1 slides, on page 14 they say there are not a number of red
2 flags in this case.

3 In point 1, as they mentioned, they talk about
4 Wells Fargo's CEO's testimony before Congress shows that
5 he knew about it. What we have is evidence that Mr. Bailey
6 was specifically told there's a problem with cramming and he
7 acknowledged it. And what we have is monthly reports that
8 are going to the senior executives that fully and
9 unequivocally disclose the extensive cramming and sales
10 misrepresentations that were taking place. So that's
11 points 1 and 2.

12 THE COURT: Okay.

13 MR. DUBANEVICH: Point 3, the legal actions that
14 were taken. Well, what we know is that Ms. Heiser was fired
15 for being a whistleblower and disclosing the problems of
16 cramming. What we know is that Arizona brought a lawsuit
17 against CenturyLink. What we know is that there were
18 customer complaints in the millions and customer lawsuits.
19 So, Your Honor, I think we've satisfied point number 3.

20 Point number 4, the *Los Angeles Times* interviews.
21 We've interviewed at least 20 former employees. And as our
22 chart indicates, these are former employees from all over
23 the company in all regions, including the corporate office.

24 Point number 5, they talk about significant
25 regulatory interventions and OCC supervisory letters. Your

1 Honor, what we know here is that CenturyLink did internal
2 audits, that they closely tracked complaints that were sent
3 to the Federal Communications Commission, that they closely
4 tracked complaints that went to state regulatory boards. We
5 know for a fact that they were paying attention to Attorney
6 General investigations. So I think we've more than
7 adequately satisfied point 5.

8 Point number 6, more than 5,300 Wells Fargo
9 employees were terminated. We don't know how many employees
10 were terminated at CenturyLink, but we do know that they
11 were fired and we do know that they had an extraordinary
12 problem retaining employees, who said repeatedly I can't
13 meet the sales metrics. And a lot of people said the only
14 way I can do it is by selling false information to the
15 customers and they couldn't do that, so they quit. I think
16 we more than adequately fit number 6.

17 And then number 7, Wells Fargo received regular
18 internal investigation reports. As I've said, Your Honor,
19 we've already cited at least two different kind of reports
20 that went to the C-suite that talked about both their sales
21 revenue, but also the reports of cramming.

22 So, Your Honor, I think we clearly fit into the
23 *Wells Fargo* --

24 THE COURT: Thank you very much for making sure it
25 was clear to me.

1 MR. DUBANEVICH: Thank you, Your Honor.

2 THE COURT: Anything else, Counsel?

3 MR. GIBBS: Yes, Your Honor. If I may, I would
4 just like to respond to those specific points.

5 So as to point 1, the testimony from the CEO of
6 Wells Fargo in front of congressional committees. Counsel
7 first said that testimony took place in 2016, which is late
8 or it may be even after the class period. That's a red
9 herring. The testimony concerned what the board and
10 management knew back in 2012 and '13 and '14 and '15, right
11 during the class period. So the question of when he
12 testified is irrelevant. The issue is what was he saying
13 about the senior executives' and board's knowledge during
14 the class period.

15 And I would encourage the Court to please read
16 Judge Tigar's decision. He references that testimony
17 repeatedly. It is a very important part of his analysis.
18 It is not present here.

19 The attempt to analogize the CEO's admission
20 before Congress that his executive team and the board knew
21 of illegal conduct for years is not remotely comparable to
22 the Bailey allegation even if you accept it at face value.
23 We think that the e-mail that we have put in front of the
24 Court is properly before the Court and completely undermines
25 that allegation, but even on its face it's not remotely

1 comparable.

2 Counsel said -- I'm sorry. I tried to get the
3 words down, so I think this is accurate, but I don't have a
4 transcript. But I heard counsel say that they had
5 identified reports that, quote, fully disclosed the extent
6 of the cramming that went to senior executives. That's not
7 true. That's not a fair characterization of what's in the
8 complaint.

9 The complaint says that reports about cramming and
10 other billing complaints went to executives. That's not the
11 same as saying there's a report that disclosed -- fully
12 disclosed the total extent of the cramming, much less that
13 the reports showed cramming is happening on such a massive
14 scale that it could possibly have inflated their \$4 billion
15 a quarter in revenue.

16 Also I heard counsel say we know that Heiser was
17 fired in retaliation. We don't know that. Those are
18 allegations in a lawsuit that was settled very quickly after
19 it was filed. It's one lawsuit.

20 I will say that in discussing the lawsuits at
21 issue in *Wells Fargo*, Judge Tigar was very careful to say
22 that the plaintiffs in that case were not citing the
23 lawsuits to support the allegation that the unauthorized
24 account creation had occurred. They were not citing them as
25 evidence that the allegations in the complaint were true.

1 They were citing them to say the sheer volume of complaints
2 filed throughout the five-year class period, making the very
3 same, very specific allegation that customers were opening
4 unauthorized accounts, was one of many things that would put
5 the board on notice during that period that this conduct was
6 occurring.

7 A single employee working out of her home office
8 in Arizona filing a wrongful discharge or retaliatory
9 discharge claim, which, by the way, is at the very end of
10 the class period here -- it's part of what plaintiffs claim
11 brought the truth to light -- is not remotely comparable to
12 the cascade of lawsuits that Judge Tigar cited as having put
13 the Wells Fargo board on notice that something was going on.

14 On the *Los Angeles Times* article, again, it's a
15 timing point. Counsel's reference to the employees they
16 interviewed and the facts alleged in the amended complaint
17 is a red herring. The reason why Judge Tigar cited the
18 *Los Angeles Times* article was not because it established the
19 truth that unauthorized accounts were being created. He
20 cited it because it was published right in the heart of the
21 class period and put the directors on notice that Wells
22 Fargo employees were creating unauthorized accounts.

23 The amended complaint here that reflects all of
24 the plaintiffs' work and all of the former employee
25 interviews was not filed until like a year after the class

1 period ends. Their complaint can't be analogized to a
2 newspaper article that comes out during the class period and
3 put the directors on notice of what was happening during the
4 class period. So the analogy there is simply false.

5 Counsel referenced internal audits. This again
6 gets to my point. It's not enough to talk about reports,
7 documents, audits. They have to have some indication of
8 what's actually in them. Other than the allegation that's
9 lifted from the briefing in the Minnesota Attorney General
10 Office lawsuit, there's no allegation about what these
11 reports showed that would support an inference that the
12 reports put people on notice that this is happening on a
13 massive scale.

14 Counsel talked about exit interviews of employees.
15 I'd just go back to what I said about the alleged
16 retaliatory termination. There's no connection between
17 individual employee exit interviews and the senior
18 executives who have been named as individual defendants
19 here.

20 I just want to close by emphasizing a point about
21 Judge Tigar's decision. I'm citing language at page 13 of
22 the *Shaev*, S-h-a-e-v, vs. *Baker* case. It's 2017 WL 1735573.
23 Judge Tigar wrote, quote, While any of these red flags might
24 appear relatively insignificant to a large company like
25 Wells Fargo when viewed in isolation, when viewed

1 collectively they support an inference that a majority of
2 the director defendants consciously disregarded their
3 fiduciary duties despite knowledge regarding widespread
4 illegal account-creation activities and therefore there is a
5 substantial likelihood of director oversight liability.

6 Now, the language that the judge is using there is
7 because in that part of the opinion he's analyzing a breach
8 of fiduciary duty claim. He later cites back to that
9 discussion when he makes a finding as to scienter as part of
10 the securities fraud claim. But that's the basis of his
11 finding.

12 And the point I wanted to emphasize here is it's
13 not enough to pluck one or two or three of the things out of
14 *Wells Fargo* and say we sort of ring a faint bell that's kind
15 of like this thing in *Wells Fargo*. Wells Fargo's result
16 turned on all of those things considered collectively. So
17 unless we have all of those things here, you can't reach the
18 same result based solely on what Judge Tigar did in the
19 *Wells Fargo* cases.

20 Thank you, Your Honor.

21 THE COURT: Thank you.

22 Anything further? If not, we'll adjourn for this
23 morning. I will take this matter under advisement and get
24 my order out as quickly as possible. Enjoy the weekend.
25 Thank you.

1 (Court adjourned at 9:53 a.m.)

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5 I, Lori A. Simpson, certify that the foregoing is a
6 correct transcript from the record of proceedings in the
7 above-entitled matter.

8
9 Certified by: s/ Lori A. Simpson

10 Lori A. Simpson, RMR-CRR
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